Supreme Court, U.S.
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No. 99-259

In The
Supreme Court of the United States

**ALBERTO O. LOZADA COLON,**

*Petitioner,*

v.

**DEPARTMENT OF STATE, et al.,**

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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# REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

The Solicitor General argues that a judicial forum should not be available to Petitioner's contentions because he continues to be regarded as a United States (U.S.) citizen, a benefit rather than a burden. (Res. 12, footnote 4). Petitioner disagrees with the logic of the Solicitor General.

After the codification of the Expatriation Act of March 2, 1907, 34 Stat. 1228 (1907), clearly renouncing ones citizenship was a right reserved for U.S. citizens. There are two distinct concepts that can occur in the loss of U.S. citizenship process: (1) an "expatriation," when an individual voluntarily relinquishes his nationality; or (2) a "denationalization," the involuntary removal of an individual's citizenship by a government. See Laurence Abramson, United States Loss of Citizenship Law After Terrazas: Decisions of the Board of Appellate Review, 16 N.Y.U. J. Int'l L.&Pol.829, 831 (1984). While U.S. law has recognized the right of voluntary expatriation since 1868, Congress did not enumerate the specific conducts that could result in involuntary loss of citizenship until 1907. 4 Gordon et al., Immigration Law and Procedure, 100.03[2][b][iii]. Under the Immigration and Nationality Act (INA), loss of citizenship can be based either on voluntary expatriation or involuntary denationalization. With respect to contested loss of citizenship cases under the INA, it is more precise to refer to congressional denationalization rather than expatriation. See Abramson, supra, at 832 (discussing congressional denationalization).

Thus, the logic of the Solicitor General that the denial of a Certificate of Loss of Nationality (CLN) is a benefit rather than a burden is not supported by case law and the history of the Expatriation Act. The issuance of a CLN in a voluntary renunciation is not the denial of a right based on a claim as a U.S. national but, rather, the grant of a right as a U.S citizen, e.g., to renounce voluntarily American citizenship. Heuer v. Secretary of State, 20 F.3d 424, 427 (11th Cir. 1994), citing

Maldonado-Sanchez v. Shultz, 706 F. Supp. 54, 56-57 (D.D.C. 1989). However, the involuntary removal of an individual's citizenship by a government would constitute denationalization, which may involve the denial of a right as a U.S. citizen. Here, Petitioner voluntarily, intentionally and unequivocally conducted an irrevocable expatriation act.

Moreover, the foundation of the U.S. rested on the right to expatriation. The Declaration of Independence itself was a Lockean justification of expatriation. See Peter Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity at 49 (1985). Congress passed the Expatriation Act of 1868 one day before the ratification of the Fourteenth Amendment. Id. at 86. The Expatriation Act "clearly established the principle that membership in the political community must always reflect the individual citizen's consent, a consent that must remain vital and continuing lest the individual withdraws it." Id. at 86-87. "[T]his unequivocal right of self-expatriation was eventually understood to have created a fundamental asymmetry in the nature of American citizenship, one in which an individual citizen could always sever the political relationship by withdrawing his consent anytime, but the government could never do so." Id. at 87.

The Solicitor General also contended that Petitioner's right to vote, live and work in Puerto Rico is contingent upon him remaining a U.S. citizen or as an alien properly documented under INA. (Res. 12, footnote 4). Petitioner disagreed with the Solicitor General argument advanced here.

In Miriam J. Ramirez de Ferrer v. Juan Mari Bras, No. CT-96-14 (P.R. 1997), the Supreme Court of Puerto Rico held that "[t]he citizenship of Puerto Rico has its own vitality, independent from the United States citizenship, and its juridical source is the Constitution of the Commonwealth" See also Martinez v. Asociacion de Señoras, 213 U.S. 20 (1909) (a body politic, under the name of the People of Puerto Rico, with a citizenship of its own, is created). Also, other courts have considered Puerto Rico a country. See id. at 25; Pekpe v.

United States, 183 U.S. 176, 181-82 (1901). Moreover, although Puerto Rico since 1917 was connected to the American nation, it was not an integral part of the same. See Balzac v. Puerto Rico, 258 U.S. 298 (1922). The grant of U.S. citizenship did not alter the essential character of Puerto Ricans as a people different from the American people. Id. at 311. "It enabled them to move into the continental United States and become residents of any State there to enjoy every right of any other citizen of the United States civil, social and political." Id. at 308.

The issue in the Mari Bras case was whether a citizen and national of Puerto Rico who had renounced his U.S. citizenship and been issued a CLN by the Department of State was able to vote in Puerto Rico's general elections. The Supreme Court said that since he was a citizen and national of Puerto Rico domiciled on the island, he was a qualified voter. Mari Bras' vote was counted in Puerto Rico's national elections.

Moreover, the Solicitor General's argument is similar to the one made by Department of State before the U.S. District Court. In justifying the denial of Petitioner CLN, the Department of State has Characterized the status of Puerto Rico as an incorporated territory similar to Washington, D.C.[1]

A decision to deny the CLN based on the argument that Puerto Rico is part of the U.S. and similar to the District of Columbia, i.e., an incorporated territory, or a state is an issue settled by the Courts. Puerto Rico has never been incorporated into the U.S. It is a foreign possession that merely belongs to but is not part of the U.S. Id. 305-06, with a Compact to work on their relations between the people of the possessed territory and Congress. Since Puerto Rico is a foreign possession in the domestic sense, Congress can legislate for the island, basically without constitutional limits in many areas. The approval of the

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[1] However, the issue at bar is whether the Secretary of State has discretion to deny a CLN involving a voluntary renunciation under 8 U.S.C. section 1481(a)(5) and Section 358 of the INA, 8 U.S.C. section 1501.

Foraker Act, 31 Stat. 77 (1900) and Jones Act, 39 Stat. 951 (1917), which are still in effect today, prevents immigration laws from excluding Puerto Rican citizens and nationals who are not U.S. citizens from their motherland. Congress may treat Puerto Rico differently from a state so long as there is a rational basis for its action. Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (per curiam opinion); see also Califano v. Torres, 435 U.S. 1 (1978) (Congress can exempt Puerto Rico from receiving supplemental Social Security benefits if they reside in Puerto Rico); Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604 (1950) (Sugar Act of 1948 applying quotas of sugar coming from Puerto Rico into the U.S. constitutionally valid). Moreover, authority over maritime matters was delegated to Puerto Rico, which would have been unconstitutional if delegation were made to a state or an incorporated territory. Lastra v. New York & Puerto Rico S.S. Co., 2 F.2d 812 (1st Cir. 1924); Guerrido v. Alcoa Steamship Co., 234 F.2d 349 (1st Cir. 1956); Fonseca v. Prann, 282 F.2d 153 (1st Cir. 1960), cert. denied, 365 U.S. 860 (1961); Torres v. Sea Land Services, Inc., 597 F.2d 284 (1st Cir. 1979). Congress has never purported to effect such an incorporation for Puerto Rico. Downes v. Bidwell, 182 U.S. 244 (1901). Therefore, for the same reasons that Puerto Rico is currently not incorporated within the meaning of the phrase "the United States" for purposes of application of the uniformity clause of the Constitution, U.S. Const. amend. I, § 8, cl. 1, Puerto Rico is not incorporated within the meaning of the "United States" for purposes of the citizenship provisions of the Fourteenth Amendment and the INA. Cf. Downes v. Bidwell, Id. at 313 (Opinion of White, J.) (noting serious problems that would arise if, upon the acquisition of a foreign territory, all the inhabitants thereof would automatically and as a matter of right become citizens of the United States). Thus, the Secretary of State not only lacks discretion under the statute to deny a CLN to a person who relinquish his U.S. citizenship voluntarily under 8 U.S.C. section 1481(a)(5) and 8 U.S.C. 1501 but also

the reasoning to deny the CLN here was wrong and contrary to law.[2]

The denial of a CLN has left Petitioner without any legal remedy. The final administrative determination is not final, as Respondent agrees here, because until a CLN is approved and issued, any act of expatriation, whether or not intentional, is simply an act without significance to nationality. See Heuer v. Secretary of State, supra 20 F.3d at 427. Here, for example, without the CLN the Petitioner cannot claim he is only a national and citizen of Puerto Rico because he is still remains a U.S. citizen. However, if the CLN is issued,

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[2] Everyone has the right to change his nationality. Art. 15, Universal Declaration of Human Rights, U.N. Doc. E./CN.4/95 (1948). Additionally, Art. 19, American Declaration of the Rights and Duties of Man, as well as Art. 20, American Convention on Human Rights, the two human rights conventions under which the Organization of American States enforces human rights protections in this hemisphere, recognize the fundamental right to change one's nationality. The international human rights, treaties, and conventions unequivocally mandate as a universally recognized principle of international law (*jus cogens*) the right of Petitioner to relinquish his U.S. citizenship. These international laws also apply to the U.S.

In Bacardi Corp. of America v. Domenech, Treasurer of Puerto Rico, 311 U.S. 150, 150 (1940), in a headnote it is stated that "[a] Treaty, on ratification, becomes a part of the law, and no special legislation is necessary to make it effective." The U.S. Supreme Court has also stated in The Paquete Habana, 175 U.S. 677, 700 (1900) (citing Hilton v. Guyot, 159 U.S. 113, 163-64, 214-15 (1895)), that

> [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilized nations; and as evidence of these, to the works of jurists and commentators. . . for trustworthy evidence of what the law really is.

Petitioner has the recourse of judicial review to correct any deficiencies in the document; e.g., to read citizen and national of Puerto Rico rather than a stateless person. Because he has been denied a CLN, Petitioner cannot address the issue of statelessness upon his renunciation of U.S. nationality. Evidence in the record indicated that even if the Secretary of State had issued the CLN, it has not recognized Petitioner's Puerto Rican citizenship and nationality. However, since the Secretary of State did not issue the certificate, Petitioner is without judicial remedies other than to file a writ of mandamus to obtain the proper CLN and obtain judicial review if the CLN does not comply with the law. Moreover, [t]he requirement that a duty be 'clearly defined' to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt." Roberts v. United States, 176 U.S. 221, 231 (1990).

The Solicitor General argues that the terms of 8 U.S.C. 1481 and 8 U.S.C. section 1501 provide no basis for the distinction that Petitioner suggests here. (Res. 10 and Pet. 14). The Petitioner suggests that if there is any discretion reserved in the statute it must be confined for involuntary renunciation. The regulations appear to be clear, 22 C.F.R. 50.50 directs the diplomatic or consular officer to forward to the Department for approval the oath of renunciation together with the CLN. The manner that the Secretary of State should approve the CLN is found in 22 C.F.R. section 50.40(a), entitled Certification of loss of U.S. nationality. The regulation specifically states that "A person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship will lose his or her U.S. citizenship." The regulation which interprets the statute implies that the Department of State must issue the CLN in all voluntary renunciation cases. The authority to approve the CLN which involves

placing a date stamped that reads approved[3] is a function that pertains the Department of States Overseas Citizens Services Division. Therefore, the diplomatic or consular officer is obligated to forward the papers to the Department of State for the date stamped that read approved.

Moreover, involuntary renunciations are covered by 22 C.F.R. section 50.40(c). The regulation states in pertinent part:

> (c) Whenever a diplomatic or consular officer has reason to believe that a person, while in a foreign country, has lost his U.S. nationality under any provision of Chapter 3 of Title III of the Immigration and Nationality Act of 1952, or under any provision of Chapter IV of the Nationality Act of 1940, as amended, he shall prepare a certificate of loss of nationality containing the facts upon which such belief is based and shall forward the certificate to the Department.

However, the diplomatic or consular officer must ascertain an affidavit with the consent of the person that indeed he or she had the intent to relinquish citizenship by the voluntary and intentional performance of one of the acts specified in Section 349(a), 8 U.S.C. section 1481(a), for example, obtaining a diplomatic post with a foreign government. See 22 C.F.R. section 50.40(b). The diplomatic or consular officer shall attach such affidavit to the CLN and forward it to the Department of State.

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[3] The use of the word "approve" in the regulations should not be read to imply discretion. It simply directs the performance of a ministerial matter in voluntary renunciation cases.

Thus, the regulation makes a clear distinction that 22 C.F.R. section 50.40(a) is reserved for the voluntary renunciation when issuing a CLN and (b) and (c) are reserved for involuntary renunciations. Under 22 C.F.R. section 50.40(a), the person who voluntarily renounce his U.S. citizenship pursuant to 8 U.S.C. 1481(a)(5) will automatically receive a CLN.

Petitioner's equal protection claim is properly raised before this Court. Furthermore, Respondant's argument that Petitioner raised the equal protection claim for the first time is incorrect. (Res. 12). Petitioner writ of mandamus petition specifically raised the issue and argued that by not adjudicating Petitioner's CLN, e.g., issuing him the CLN, and providing other similarly situated individuals with a CLN, discriminated against Petitioner. This argument is found in Petitioner's writ of mandamus petition filed with the U.S. District Court. See section IX "Argument and Conclusion" of petition for writ of mandamus.[4] However, even if Petitioner raised the issue for the first time before this Court, the Court may in its discretion consider a Constitutional issue such as equal protection for the first time on appeal. See Milhouse v. Levi, 548 F.2d 357, 363 (D.C. Cir. 1976) (although issue of Ex Post Facto Clause violation had not been presented to the district court, the court would nevertheless hear it since the issue was one of law which did not require further factual development). Citing Holmer v. Helvering, 312 U.S. 552, 557. Therefore, Petitioner no only raised the issue at the U.S. District Court for the District of Columbia but also raised the issue before the U.S. Court of Appeals for the D.C. Circuit and here.

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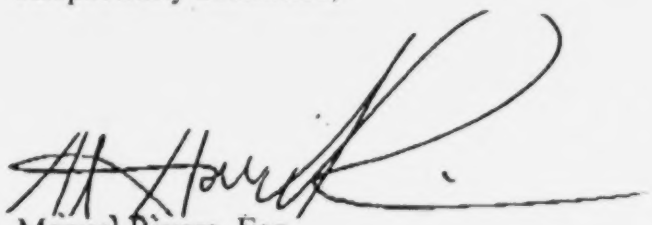
[4] The exact language used in the petition for writ of mandamus filed with the U.S. District Court for District of Columbia reads as follow: " Defendants have no legitimate interest in denying Plaintiff's adjudication of his petition for loss of nationality according to the statute and regulations, in discriminating against the Plaintiff (by providing decisions to other applicants for loss of nationality and withholding same to Plaintiff)"

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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